

COMMENTS OF THE AMERICAN BOOKSELLERS ASSOCIATION TO THE
ANTITRUST MODERNIZATION COMMISSION
ROBINSON-PATMAN ACT PANEL

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INTRODUCTION

A free society thrives in a free marketplace of ideas. Since the late 1980s and early 1990s, there has been a precipitous decline in the number of independent bookstores serving the public. Independent bookstores have been forced out of business by superstore chains and other large book retailers whose rise has been fueled by illegal purchasing terms. While the playing field is more level than it used to be, due in no small measure to Robinson-Patman Act enforcement by the American Booksellers Association against publishers and powerful chain buyers, large retailers still enjoy a significant unfair advantage in purchasing terms. Flaws in the Robinson-Patman Act contribute to the inability of independent bookstores to obtain a completely level playing field, but despite its flaws, the existing Act has at least limited the unfair price advantages enjoyed by large retailers.

If the Act were abolished or narrowed further, inevitably the large retailers would dictate prices to publishers, and the gap in purchasing terms between large and small retailers would widen so much that a huge number of the remaining independent bookstores would go out of business. The country would then lose the diversity in the selection and promotion of books provided by independent booksellers, and many communities too small to support chain superstores would lose their only bookstores. Were the retail landscape populated by only a few large retailers, the economic decisions to remove many titles from the shelves would have a disastrous effect on the dissemination of culture and ideas in America.

The Retail Market for Books

Independent booksellers have disappeared from the marketplace in massive numbers in the past fifteen years, although the trend appears to have leveled-off in the past few years. The American Booksellers Association (“ABA”), a trade association of bookstores founded in 1900, has gone from a membership high of 5,200 in 1991 to 1,791 members today, a 65% decline in less than fifteen years. The decline in ABA’s membership is indicative of a general decline in the number of independent bookstores, whose share of the market has dwindled from a third of the entire consumer book market in 1991, to approximately 9% today.¹ The independents’ share of the market appears to be trending up this year, which continues a four year trend of stable market share numbers, but with a declining number of independent stores. The closing of independents has coincided with the rise of superstore chains, such as Barnes & Noble and Borders, and mass merchandisers, such as Costco and Wal Mart, as well as the more recent expansion of Internet retailers, such as Amazon.com.

Before the advent of the superstores, there was significant and real expansion of book sales and titles. In the 1970s and 80s, the U.S. book market expanded at a rapid pace, both in terms of the number of separately owned book outlets, and in terms of the number of new book titles published.² In the late 1980s and early 1990s, this trend came to a halt as Barnes & Noble and Borders began to roll-out book “superstores” – very large

¹ It should be noted that the independent bookstores’ market share has also been affected by a change in the methodology for calculating market shares. Ipsos BookTrends, which reports market shares in the book industry, recently reclassified a significant number of stores that had formerly been classified as independent bookstores, thereby lowering the reported market share of the independent sector. Nevertheless, there has been a dramatic decrease in the independents’ market share since the early 1990s.

² Richard Howarth, *Independent Bookselling & True Market Expansion*, Bookselling This Week, April 30, 1999 (available at www.bookweb.org/news/btw/1932.html), at 1.

stores with amenities such as coffee bars and seating – across the country.³ Barnes & Noble and Borders did not invent the superstore concept – a number of independent stores across the country, including the Tattered Cover in Denver, Elliott Bay in Seattle and Library Limited in St. Louis⁴ had begun operating large format stores years before the chains – but the chains were the first to attempt a nationwide expansion. Superstores have in the years since then massively expanded the square footage devoted to bookselling, and carry more titles than the typical retail bookstore, but they have not expanded the market for books. Nor has the expansion of Internet bookselling increased the size of the book market. Book sales in terms of dollars spent on books have increased during the 1990s and the first decade of this century, but that has been primarily due to the higher price of books, not a significant increase in the number of units sold.⁵

Discriminatory Terms

The spread of superstore chains and other large book retailers has been fueled by illegal purchasing terms. In 1994, following a year-long investigation into unfair trade practices favoring chain bookstores and mass merchandisers, ABA brought suit on behalf of its members against five major publishers, alleging that these publishers had violated the Robinson-Patman Act.⁶ The investigation and subsequent lawsuit was prompted by

³ *Id.* at 6-8.

⁴ Library Limited was later acquired by Borders.

⁵ See, e.g., American Booksellers Association, *BISG: Book Industry Revenues to Increase 18.3 Percent Over Next Five Years*, Bookselling This Week (available at www.bookweb.org) (projecting that, although net dollar sales of publishers for 2005 will increase by 5.3%, unit sales are projected to increase by only 2.1%); Book Industry Study Group, Book Industry Trends 2005 14, 18 (2005) (showing modest percentage increases in trade book consumer expenditures between 2001 and 2004 as compared to flat or declining unit sales over same time period); Book Industry Study Group, Book Industry Trends 1999 2-8, 2-12 (1999) (same for most years between 1995 through 2000).

⁶ At the time the ABA brought its lawsuit, the FTC was prosecuting Robinson-Patman claims against what were then the largest six publishers in the country over similar alleged practices. After dragging on for several years, the FTC dropped its case against the publishers in late 1996, reportedly due to a stalemate amongst the Commissioners over proposed settlement terms with the publishers. The FTC cited ABA's

years of both rumors and published examples of discounts and promotional allowances that publishers provided to chains and mass merchandisers but did not make available to independent bookstores. In the early 1990s, many of the discriminatory price terms that harmed independents were in plain view – published by the publishers in the ABA’s Bookbuyers’ Handbook (known in the industry as the “Redbook”) – in the form of steep volume discount schedules that did not appear to have any efficiency justification whatsoever. For example, in 1994, one major publisher who became a defendant in ABA’s lawsuit, published a discount schedule that required the purchase of 4200 books to obtain its maximum discount of 47% off list price, as compared to 43% for 25 books (a level at which many independents could routinely place orders from such a major publisher). Similarly, another defendant publisher required a purchase of 3000 books for its maximum 48% discount as compared to the 40% discount available to stores that could purchase ten books or more at a time. It is an understatement to observe that the required volumes for these publishers’ top discounts were at a level well out of reach for even the largest independent bookstores, yet these discounts were available to chain bookstores, even when, as was typically the case, they purchased the required volumes but had the books drop shipped in much smaller quantities (even one per store) to their individual stores. Under those circumstances, the publishers saved nothing shipping the required quantities one at a time to thousands of chain outlets, versus shipping the same or greater quantities to individual stores that were independently owned. But the chains nonetheless were given a significant (in the above examples 4% to 8%) price advantage – in an industry in which margins have historically been razor thin – just by virtue of

ongoing litigation in the industry as one reason continued FTC action was unnecessary. *In the Matter of Harper & Row Publishers, Inc.*, 122 F.T.C. 113, 113-16 (1996).

having multiple outlets. And while we cite these two major publishers as examples, these steep and unjustified discount schedules were widespread among publishers at that time, not only among defendants to the lawsuit. Moreover, many publishers offered chains that operated retail distribution centers (“RDCs”) additional discounts beyond those booksellers’ already high drop ship discounts. But these terms were generally not published or otherwise made known to the industry at large at that time, nor did most publishers make them available to independent booksellers that either had their own RDCs, or the capacity to provide some or all of the functionality of an RDC (*e.g.*, the ability to receive shipments in carton quantities on a loading dock).

ABA’s 1993 pre-litigation investigation revealed that many publishers were also offering chains promotional and cooperative advertising allowances in forms and at dollar levels that were totally unknown (and unimaginable) to independent bookstores. ABA learned that essentially the chains treated their stores as real estate, and charged publishers extremely large amounts (as much as \$10,000 to \$20,000 at that time, sums that have grown much larger since then) to give those publishers’ bestsellers prime placement within the chains’ stores. Almost every type of placement – front of store, end of shelves, front counter, etc. – within the store had an exorbitant price.⁷ These types of opportunities were unknown to independents because they were not published. Indeed, ABA’s investigation revealed that these types of payments were not so much *offered* by the publishers as created and *demand*ed by the chains. These display space promotional allowances served as a profit center because they entailed little to no out-of-pocket expense by the chains in order to collect large amounts of money (in reality an extra

⁷ See also Randy Kennedy, *Cash Up Front*, The New York Times, June 5, 2005; Andre Schiffrin, The Business of Books 125 (2000); David D. Kirkpatrick, *Report to the Authors Guild Midlist Books Study Committee* 5 (2000).

discount) from the publishers. In contrast, while publishers had traditionally offered all booksellers opportunities for cooperative advertising, as the name implies, this type of promotion entailed a shared advertising *expense*, such as a newspaper or radio advertisement, that was paid partly by the bookseller and partly by the publisher. Cooperative advertising did not serve as a profit center for the independent bookstore. Indeed, as part of its investigation, when ABA asked publishers about the availability of display allowances on proportional terms to all stores, some publishers denied their existence.

Perhaps more egregious than the discriminatory terms the publishers provided the chains were the large discounts provided to mass merchandisers. The mass merchandisers do not carry a broad selection of titles, as do traditional retail booksellers, but, rather, carry a relatively few bestsellers at incredibly steep discounts off of list price. The mass merchandisers were then (and in some instances still are) selling some books to the public at a lower price than many independent stores could purchase the same books directly from publishers.⁸

Each of the publishers settled with ABA and its members on terms that narrowed the gap between large retail booksellers and independents, and made publicly available to independents for the first time some of the display allowances that had been secretly provided to the chains. However, in 1997, during the course of an investigation of possible violations of the consent order by one of the publishers with whom ABA had settled, it became clear that the chain bookstores were still demanding and receiving myriad unpublished and unjustified discounts that were unavailable to independents. As

⁸ Bonita Brewer, *After 25 Years, Livermore Will Lose Its Only Bookseller That is Independent and Devoted to Selling New Titles; Altamont Books Set to Close Its Doors*, Contra Costa Times, April 25, 2005.

a result, the Association and twenty-six of its members determined that if there were to be any hope of securing a level playing field they would need to sue the two largest chain stores in the country, Barnes & Noble and Borders. That lawsuit was ultimately settled in the middle of a trial in April 2001, and the defendants insisted as a condition of the settlement that all the evidence that had been discovered in the lawsuit that had not yet been presented at trial be destroyed and remain subject to a strict protective order. Nonetheless, the amount of evidence (summarized below) that is publicly available demonstrates a pattern by the chains of demanding large unjustified discount and promotional allowance differentials, and in some cases written documents that evidence their intent to evade the law in doing so. These highlights from the publicly available evidence are available on ABA's website (www.bookweb.org) as are the complete transcripts from the trial:

- **A high-level Borders executive stated in an internal memo that one publisher “claims to have leveled the playing field, what they don’t realize is that in a couple of years there may only be a couple of players left who will dictate the game on their own terms.”**
- Barnes & Noble has received Retail Distribution Center (“RDC”) discounts – including incentives and rebates – that total several percent greater than the 2% - 4% “standard” RDC discounts.
- On top of RDC discounts and unpublished incentives and rebates, both Barnes & Noble and Borders get a 1% “freight out allowance” to pay the freight from their RDCs to their stores, thereby eviscerating most or all of the cost justification for the extra discount received for the RDC.
- Borders receives "Vendor Compliance Chargebacks" when publishers do not follow Borders' detailed shipping and packing requirements. Distribution expert Dr. Gary Frazier testified that "especially Borders has been rather aggressive in charging back penalties to publishers who fail to follow step-by-step the compliance standards that Borders has established for the fulfillment of orders into their RDCs." These chargebacks totaled \$3.5 million in just one year.

- Aside from the "Vendor Compliance Chargebacks," Dr. Frazier testified that the vendor compliance requirements imposed by Barnes & Noble and Borders result in additional fulfillment costs for publishers in dealing with defendants' RDCs.
- Dr. Frazier concluded that even the "standard" 2% -4% RDC discounts are not justified by cost savings to publishers, let alone the additional incentives, freight rebates, compliance chargebacks, etc. that Barnes & Noble and Borders receive.
- According to Dr. Frazier, the maximum possible cost savings to publishers for shipping to publishers' RDCs is 0.44% (or 1.57% for those publishers that pay freight but do not pay for the freight costs from Barnes & Noble's and Borders' distribution centers to their stores). Dr. Frazier also testified that the savings of serving Borders is even less because Borders frequently does not order in carton quantities, even though most publishers published policies require orders in carton quantities to receive the RDC discount.
- As is well known in the industry, most publishers RDC policies require carton quantity orders, and, in fact, industry expert Gail See testified that the carton quantity requirement prevents most independents from qualifying for RDC discounts.
- The testimony at trial showed that all major publishers have waived the carton quantity requirement for Borders.
- Barnes & Noble purchased books through a sham wholesaling arrangement with a small book wholesaler called Bookazine. Under this arrangement, Barnes & Noble acquired books directly from publishers at Bookazine's wholesaler discounts, less payment of a "fee" to Bookazine.
 - **In connection with this sham wholesaling arrangement, a Barnes & Noble employee wrote in an email that terms agreed with a publisher "CANNOT be put in writing for legal reasons."**
- **A Barnes & Noble employee inquired in an internal email whether a particular discount would "create legal issues, as was our concern w/ Norton & Little Brown perennial special deals?"**
- **Trial testimony disclosed that Barnes & Noble tracked "special deals" which were provided to Barnes & Noble only and not made available "industry-wide."**
- According to testimony given by industry expert Gail See and documents referred to by ABA's counsel in opening statement, both Barnes & Noble

and Borders received 42% or 43% discounts from a national book wholesaler in circumstances in which independent bookstores received only a 40% discount.

- Barnes & Noble and Borders also received "incentive" payments from that same national book wholesaler worth an additional 1% on most purchases, and up to an additional 5% on some purchases.
- Gail See also testified that a national book wholesaler required independent bookstores to pay their bills 10 days after the end of the month in order to receive a 2% cash discount, whereas that wholesaler permitted Barnes & Noble and Borders to pay their bills 25 days after the end of the month and still receive the cash discount.
- **In an email, a Borders executive acknowledged that "they [a national book wholesaler] are selling to us (and presumably B&N) at a rate different from the rate that they sell to every other bookstore in the country."**
- Industry expert Gail See testified that independent booksellers are required to document and chargeback each particular shortage in every shipment from a publisher. In contrast, Barnes & Noble and Borders receive automatic deductions across the board to cover any potential shortages. Furthermore, Barnes & Noble conducted no audits to support these deductions and a Barnes & Noble executive acknowledged in an internal email that these deductions were "not fact based."
- Barnes & Noble received "exclusive" deals on bestselling titles for its "Holiday Featured Title" plan.

As the foregoing should graphically illustrate, the chains have demanded and received numerous unpublished special deals that are not justified by any purported efficiencies that the publishers achieve in selling their books through the chains as opposed to the independents.

Results of Robinson-Patman Act Litigation: A Less Uneven Playing Field

For the independents that remain, the playing field is far more level than it was at the time ABA brought its first lawsuit against the publishers. At least in their published terms, most publishers now permit all retail stores the opportunity to earn their maximum

drop ship discount at a volume level that is practically achievable at least some of the time by the vast majority of independents. For instance, both of the two publishers in the example provided above from the early 1990s now permit independents to earn a 46% drop ship discount on purchases of \$216 at cost, or 20 books, respectively. For the typical independent, this would represent a four to six percent improvement in discount over what that store would have paid for purchases at comparable volumes in the early 1990s. Given that the average independent operates at an annual loss of approximately two percent of sales per year,⁹ such an improvement in purchasing terms certainly means the difference between staying in business or closing their doors for a substantial number of independents. Moreover, many publishers that offer RDC discounts now make those discounts publicly available to all bookstores that can meet their requirements. While most independents still cannot meet the requirements necessary to obtain these extra discounts, there are some that can and do take advantage of these publicly available terms. And many publishers now publicly offer display promotional allowances that are at least purportedly proportionally available to all bookstores.

Through its ongoing monitoring of the industry, ABA is aware that large retailers, including the major chains, mass merchandisers, and Internet booksellers, still enjoy a significant unfair advantage in purchasing terms – differences that are not due to the difference in cost to publishers of dealing with larger retailers versus independents. For instance, mass merchandisers still sell at times to the public at discounts that independents cannot get from the publishers.¹⁰ But the impact on independents of discriminatory terms has lessened as these differences have abated. The percentage of

⁹ American Booksellers Association, ABACUS (2004) (available at www.bookweb.org).

¹⁰ Bonita Brewer, *After 25 Years, Livermore Will Lose Its Only Bookseller That is Independent and Devoted to Selling New Titles; Altamont Books Set to Close Its Doors*, Contra Costa Times, April 25, 2005.

books sold by independent booksellers has held steady (and even slightly increased) at approximately 9% for the past three years.

Flaws in the Robinson-Patman Act and in its Interpretation

The discrimination in terms that continues is due in part to flaws either in the Act itself, or the interpretation that some courts have given the Act. First, the meeting competition defense is an exception written into the Act that nearly swallows the rule against unjustified price discrimination entirely.¹¹ ABA does not oppose discounts that are provided on a genuine meeting competition basis, but the chains have stretched the meeting competition defense far beyond its historical reach – to justify matching specific competitive offers where the buyer can substitute one sellers’ products with another.¹² Books are not the same as milk or gas. In the bookselling context, where no full-line bookseller can truly substitute one publisher’s line of books for another, chains have used the meeting competition defense as a sham and a generic threat to get all publishers across-the-board to provide them discriminatory terms even though in most cases it would be impossible to substitute one publisher’s books for another, and the chains have no intention of doing so. The publishers have used the meeting competition defense as an excuse to justify acceding to the chains’ demands.

Second, it should be possible to show actual injury under Section 4 of the Clayton Act¹³ in Robinson-Patman Act damages cases using rational economic models that assume basic economic facts (*i.e.*, that a competitor that has lower supply costs than its

¹¹ 15 U.S.C. § 13(b).

¹² *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 84-85 & n.17 (1979).

¹³ 15 U.S.C. § 15.

rival will gain a competitive advantage from those lower costs).¹⁴ Moreover, although a Robinson-Patman plaintiff who is seeking damages must show that its injury is traceable to the alleged price discrimination, most courts have properly held that the plaintiff need not show that the discrimination was the sole cause of its injury, or eliminate every last alternative source of injury.¹⁵ Once the plaintiff comes forward with some evidence that its injury was caused by price discrimination, it should be for the jury to determine whether that evidence is sufficient, or whether plaintiff's injury was not caused by price discrimination.¹⁶ Unfortunately, the Court that ruled upon the booksellers' damages claims in their suit against Barnes & Noble and Borders required a level of detail in the actual injury causation showing which would make Robinson-Patman Act damages claims all but impossible to prove were it widely accepted.¹⁷

Third, the standard for assessing functional discounts to wholesalers who do not compete at the retail level should not be applied in judging whether discriminatory discounts among retailers are lawful. It is already difficult in a buyer-side case to prove that the buyer *knew* that the discriminatory prices it received were not cost justified, *i.e.*,

¹⁴ See, e.g., *J.F. Feeser, Inc., et al. v. Serv-A-Portion, Inc., et al.*, 909 F.2d 1524, 1538-39 (3rd Cir. 1990) (holding that expert evidence of price difference over time in market with low margins and intense competition was probative of actual injury and sufficient to defeat summary judgment).

¹⁵ See, e.g., *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-66 (1981) (“[I]n the absence of more precise proof, the factfinder may conclude as a matter of just and reasonable inference from [1] the proof of defendant’s wrongful acts and their tendency to injure plaintiff’s business, and [2] from the evidence of the decline in prices, profits and values, [3] not shown to be attributable to other causes, that defendant’s wrongful acts had caused damage to the plaintiffs”); *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1042 (9th Cir. 1987) (“While a defendant may introduce evidence of alternative causes of the injury, such evidence constitutes only a part of the information the jury may consider in determining whether price discrimination was or was not a material cause.”), *aff’d*, 496 U.S. 543 (1990); *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 421 (8th Cir. 1986) (“In most cases it is reasonable to infer that the disfavored competitor is injured as a result of the discrimination”).

¹⁶ See, e.g., *Hasbrouck*, 842 F.2d at 1042.

¹⁷ *American Booksellers Association, Inc., et al. v. Barnes & Noble, Inc., et al.*, 135 F.Supp.2d 1031, 1040-41 (holding that although plaintiffs provided evidence of lost sales and profits and expert evidence of link to discriminatory terms, that plaintiffs’ expert had not eliminated all other possible causes of injury).

were not justified by cost savings to the seller.¹⁸ In the ABA litigation, the chains advanced the position that, even if the RDC discounts they sought and received from the publishers were not cost justified, the discounts should be permitted if they reimbursed the chains for costs the chains incur in servicing their own stores. Stated differently, even if the chains' RDCs do not save (or even if they cost) the publishers money as compared to the cost of drop shipping books to individual stores, the publishers should be permitted to pay the chains for costs the chains incur in operating their RDCs. Such a rule would essentially permit an unlimited discount to a favored or powerful buyer because the discount need not be tethered in any way to cost savings to the publisher. The chains obviously operate RDCs because they believe they provide a competitive advantage, and permitting non-cost justified RDC discounts to the chains effectively allows the chains to demand that the publishers fund the chains' competitive advantage. In a suit challenging discriminatory discounts between buyers competing at the same functional level, cost justification should remain the standard for determining the legality of such discounts.¹⁹

What's Good for Consumers?

A fair question for the Commission and the public to ask is whether the extra discounts received by large book retailers, even if illegal under current law, ultimately benefit consumers in lower prices. Although the chains have been effective at creating the impression that they have lower prices, the fact of the matter is that their prices are frequently no lower than the prices in independent bookstores. Almost five years ago,

¹⁸ Only actual cost savings *by a publisher* that sells to chains – not the chains' own expenditures – are relevant to cost justification. *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 561 n.18 (1990).

¹⁹ See *In re Boise Cascade Corp.*, 107 F.T.C. 76, 210 (1986) (holding “that a favored distributor cannot avoid the inference of competitive injury by claiming that its costs equal its discriminatory advantage.”), *remanded on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988), *order reinstated*, 113 F.T.C. 956 (1990).

Barnes & Noble and Borders quietly raised their prices.²⁰ Both chains eliminated across-the-board discounts that they used to have on all trade books in their retail stores. In addition, both chains have reduced the discounts they provide on a very small number of bestselling books.²¹ Although these books are “usually stacked near the entrance to create the impression of low prices,” most of the titles in both chains are sold at no discount at all.²² But in response to the chains’ demands for ever larger discounts, publishers have gradually raised the average list prices of new books, particularly hardcovers, in order to maintain their own profitability. Rising list prices combined with disappearing discounts to consumers has meant that the chains have actually ultimately driven *higher* prices to consumers.²³ It is true that superstores carry far more titles than the average independent bookstore, and that they have other amenities such as coffee bars that many independents do not have. However, given the litany of unfair practices discussed above, it seems clear that these advantages are funded at least in part by discounts that are not made available to the average independent bookstore, and that many more independents could offer equal selection and amenities if the same terms were made available to them. A fair opportunity for independent retailers to compete was clearly one of the primary concerns motivating the Congress that passed the Act,²⁴ and, as discussed below, concern for distributional fairness and a diversity of outlets

²⁰ David D. Kirkpatrick, *Quietly, Booksellers Are Putting an End to the Discount Era*, New York Times, Oct. 9, 2000.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ See Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 Iowa L. Rev. 1011, 1060-64 (2005); Robert Pitofsky, *The Political Content of Antitrust*, 127 U.Pa.L.Rev. 1051 *passim* (1979); Louis B. Schwartz, *Justice and Other Non-Economic Goals of Antitrust*, 127 U.Pa.L.Rev. 1076, 1078 (1979).

should not be abandoned today, particularly when it comes to our nation's intellectual capital.

The continued vitality of independent bookstores is important for two critical reasons quite apart from the title selection and amenities of any particular store: they provide diversity in the selection and promotion of books, and they serve communities that are too small to be served by chain stores (both by operating stores in those communities and by carrying books that are relevant to those communities).

Diversity of Book Buyers/Selection

The diversity of titles available to the public is directly affected by the number of independently owned outlets. The loss of thousands of independent stores in the United States over the past fifteen years also has meant the loss of thousands of store book buyers making independent decisions about which books to purchase from publishers and offer in their stores. This point should not be confused with the diversity of titles available in any particular store. While it is true that the average chain superstore carries more titles than the average independent bookstore, it is also true that each independent store's inventory is different from (*i.e.*, not a mere subset or replica of) the inventory offered at the chain superstores, as well as the inventory offered at every other independent store. On the other hand, the chains make their purchasing decisions centrally, and therefore, despite their thousands of outlets, essentially two decision makers decide which books the chains purchase for their stores nationwide.

Diversity of Promotion

Different booksellers promote different titles to the public. Independents have traditionally played a critical role in promoting new and untested authors, and putting

their works directly in the hands of a customer base that many of them know personally.²⁵

In contrast, as one long-time publishing executive has observed, “[t]he major chains focus their very considerable resources on best-sellers, to the neglect of other titles, which in turn affects the decisions of publishers.”²⁶ While the reduction in the number of independent stores may not have yet affected the number of titles being published, it has, according to a prominent study of the state of so-called “mid-list” books, created a challenge to such books “getting noticed and sold.”²⁷ The study summarizes one of its key conclusions as follows:

The best explanation for the leveling off of midlist books sales in the 1990s is in the rise of the superstores and other large chain booksellers. . . . Chain-store merchandising policies help turn consumers’ attention away from midlist titles and toward an elite of books that are backed by heavy marketing budgets. Independent bookstores hand-sell favorite books to their customers, whereas chain retailers often charge publishers for favorable placement in stores, inclusion in ads, and other support. Publishers’ marketing budgets for midlist titles usually include less than \$5,000 to cover the total cost of advertising, book tours and other promotions – but just to get a book put on a table at the front of the store in one of the chains can cost \$10,000.²⁸

In short, in the words of a chain-store executive speaking to Publishers’ Weekly on the condition of non-attribution, independents are “the on-ramp for new ideas, new authors, new trends.”²⁹ Nor can the automated recommendation systems employed by online booksellers replace the personal knowledge of individual

²⁵ See, e.g., Edward Guthmann, *Before ‘The Kite Runner,’ Khaled Hosseini Had Never Written a Novel. But With Word of Mouth, Book Sales Have Taken Off*, The San Francisco Chronicle, March 14, 2005 (recounting how first-time author of renowned work was promoted to bestseller status by independent booksellers “hand-selling” to customers). Independents also account for a far larger proportion of small publishers’ (those with annual sales of less than \$50 million) sales than do any other retail segment, including online retailers. Infotrends, Book Industry Study Group, *Under the Radar: A Breakthrough, In-depth Study of the Book Industry’s Underreported Segments and Channels* 36 (2005).

²⁶ Andre Schiffrin, *The Business of Books* 125 (2000).

²⁷ David D. Kirkpatrick, *Report to the Authors Guild Midlist Books Study Committee* 5 (2000).

²⁸ *Id.*

²⁹ Richard Howarth, *Independent Bookselling & True Market Expansion*, Bookselling This Week, April 30, 1999 (available at www.bookweb.org/news/btw/1932.html), at 2.

booksellers who have read the books they recommend to their customers. Thus, independent booksellers are critical to the success of new authors, and the public's knowledge of and access to their works.

Serving Smaller Communities

Many independents have small general interest stores that serve very small communities. In addition, the owners of these stores often come from and know the local community well, and carry books of particular interest to that community. The chains have not attempted to enter such markets, because they are too small to support a superstore. Nonetheless, independent booksellers in those small communities, like other small retailers, have faced increasing competition from the mass merchandisers, like Wal Mart, who do locate in such towns or in communities nearby. Although these independents do not and will never receive discount terms that even approach what such mass merchandisers are able to command, the increased discounts they have obtained as a result of ABA's Robinson-Patman litigation has allowed many of them to continue to serve those communities even in the face of competition from the mass merchandisers.

CONCLUSION

Contrary to the intention of its framers, who viewed the Robinson-Patman Act as a measure to protect small businesses generally and preserve diversity of ownership and local control, small businesses have in fact found it quite difficult to obtain relief under the Act. Although the American Booksellers Association views the Robinson-Patman Act as an imperfect vehicle to preserve diversity

among booksellers, the Association has successfully used the Act to obtain better terms for its members and all small book retailers. These successes have redounded to the benefit of the public. If the Act were repealed or narrowed, nothing would prevent large book retailers from pressuring publishers to widen the gap in terms, and thereby, force additional independent booksellers out-of-business. This would have a disastrous effect on the dissemination of culture and ideas in America.